STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
PEARLIE BANKS,	)	
	)	
Complainant,	)	
	)	**Charge No.: 1998CA0885**
and	)	**EEOC No.: 21B980089**
	)	**ALS No.: 10634**
SWISSOTEL CHICAGO,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

On October 21, 1998, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Pearlie Banks. That complaint alleged that Respondent, Swissotel Chicago, discriminated against Complainant on the basis of her age when it subjected her to unequal working conditions.

This matter now comes on to be heard on Respondent's Motion for Summary Decision. Complainant has filed a written response to the motion, and Respondent has filed a written reply to that response. In addition, Complainant filed a surreply which Respondent has moved to strike. The matter is now ready for decision.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documents submitted by the parties. The findings did

not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Respondent, Swissotel Chicago, hired Complainant, Pearlie Banks, on or about May 15, 1996. Complainant's position was Room Attendant.

2. Complainant's date of birth is July 2, 1937.

3. On or about June 14, 1996, Complainant received a verbal warning about unsatisfactory work performance.

4. On or about July 13, 1997, Complainant received a written warning about unsatisfactory work performance.

5. On September 29, 1997, Complainant returned to work following a medical leave of absence. She gave Respondent a doctor's note which stated that she should not lift more than ten pounds.

6. Complainant never made a request for "light duty" work assignments from Respondent.

7. Complainant received written warnings for unsatisfactory work performance on or about October 12, 1997 and December 10, 1997.

8. Respondent discharged Complainant on December 11, 1997.

9. The decision to discharge Complainant was made by Tina Beverly, Respondent's Director of Human Resources. Beverly was the person who had made the decision to hire Complainant.

10. Cynthia Miller, who was thirty years old, was given

light duty assignments for medical reasons. Miller had requested such assignments.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Because of her failure to respond to Respondent's Requests to Admit, Complainant has admitted those requests.

4. Respondent's Motion to Strike Second Response and Additional Documents Filed by Complainant is granted.

5. Complainant cannot establish a *prima facie* case of discrimination against her on the basis of her age.

6. Respondent can articulate a legitimate, non-discriminatory reason for its actions.

7. There are no genuine issues of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law.

8. A summary decision in Respondent's favor is appropriate in this case.

DISCUSSION

Respondent, Swissotel Chicago, hired Complainant, Pearlie Banks, on or about May 15, 1996. Complainant's position was Room

Attendant.

On or about June 14, 1996, Complainant received a verbal warning about unsatisfactory work performance. She received a similar written warning on or about July 13, 1997.

On September 29, 1997, Complainant returned to work following a medical leave of absence. When she returned, she gave Respondent a doctor's note which stated that she should not lift more than ten pounds.

Complainant received written warnings for unsatisfactory work performance on or about October 12, 1997 and December 10, 1997. On December 11, 1997, she was discharged.

Subsequently, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent's actions were the result of discrimination against Complainant on the basis of her age.

This matter is being considered pursuant to Respondent's Motion for Summary Decision. A summary decision is analogous to a summary judgment in the Circuit Court. ***Cano v. Village of Dolton***, 250 Ill. App. 3d 130, 620 N.E.2d 1200 (1st Dist. 1993). A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. ***Strunin and Marshall Field & Co.***, 8 Ill. HRC Rep. 199 (1983). The movant's affidavits should be strictly construed, while those of the opponent should be liberally construed. ***Kolakowski v. Voris***,

76 Ill. App. 3d 453, 395 N.E.2d 6 (1st Dist. 1979). The movant's right to a summary decision must be clear and free from doubt. ***Bennett v. Raag***, 103 Ill. App. 3d 321, 431 N.E.2d 48 (2d Dist. 1982).

There are no indications of direct evidence in the record, so Complainant would have to prove her case through indirect means. The method of doing so is well established. First, Complainant must establish a *prima facie* showing of discrimination. If she does so, Respondent must articulate a legitimate, non-discriminatory reason for its actions. For Complainant to prevail, she must then prove that Respondent's articulated reason is pretextual. ***Zaderaka v. Human Rights Commission***, 131 Ill. 2d 172, 545 N.E.2d 684 (1989). *See also* ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 251 (1981).

Complainant argues that she was denied light duty assignments because of her age. That is a claim of discrimination in the terms and conditions of employment. To establish a *prima facie* case of such discrimination, Complainant has to prove three elements. She must prove 1) that she is in a protected class, 2) that she was treated in a particular manner by Respondent, and 3) that similarly situated employees outside her protected class were treated more favorably. ***Moore and Beatrice Food Co.***, 40 Ill. HRC Rep. 330 (1988).

Before considering whether Complainant can meet her evidentiary burden, it is necessary to address two matters of

importance. The first concerns a discovery issue. During the course of discovery, Respondent served Complainant with a Request to Admit containing nine questions. Complainant never responded to that Request to Admit. Under the Commission's procedural rules, when a request for admission is served upon a party, that party is deemed to admit each request unless that party files a sworn denial within 28 days. In other words, questions not denied within 28 days are deemed admitted. 56 Ill. Admin. Code, Section 5300.745(c). Thus, Complainant is deemed to have admitted all of the questions asked by Respondent in its Request to Admit.

The next evidentiary issue involves Respondent's Motion to Strike Second Response and Additional Documents Filed by Complainant. After Respondent filed its Motion for Summary Decision, the parties briefed the motion pursuant to a scheduling order entered by the motions judge. However, after Respondent filed its reply, Complainant filed a second response. The scheduling order did not allow for such a filing, and Complainant did not seek leave to file her second response. The second response features new arguments and contains documents not previously admitted into the record.

Despite being served with an order giving her leave to do so, Complainant did not file any response to Respondent's motion to strike. Moreover, there is no indication that the facts and arguments in the second response could not have been included in

the initial response. As a result, Respondent's motion to strike is granted. The arguments and facts contained in Complainant's second response will not be considered in ruling on the motion for summary decision. With those evidentiary issues out of the way, the discussion can proceed to the merits of the motion.

Complainant easily can establish the first two elements of her *prima facie* case. She was born on July 2, 1937, so she was well within the protected age group at the time of her employment with Respondent. In addition, she can prove that she was treated in a particular manner because everyone concedes that she did not receive any light duty assignments.

The problem lies with the third element. Complainant can show that a thirty year old employee, Cynthia Miller, received light duty assignments after an injury. Unfortunately for her case, however, Complainant cannot demonstrate that she and Miller were similarly situated.

As discussed above, Complainant is deemed to have admitted the requests for admission served upon her by Respondent. One of those requests asked her to admit that "[y]ou never requested 'light duty' assignments from any employee of Swissotel Chicago." In addition, Respondent submitted an affidavit from Tina Beverly, the hotel's Director of Human Resources. Beverly's affidavit states that Miller received light duty after requesting such assignments.

In other words, Miller requested light duty, while

Complainant did not. On these facts, that difference is enough to show that Complainant and Miller were not similarly situated. Thus, Complainant cannot establish her *prima facie* case.

Under Commission precedent, a complainant can prevail at public hearing even without establishing a *prima facie* case. If, during a hearing, a respondent articulates a legitimate, non-discriminatory reason for its actions, there is no longer a need for a *prima facie* case. At that point, the decisive issue becomes whether the articulated reason is pretextual. *See* ***Clyde and Caterpillar, Inc.***, 52 Ill. HRC Rep. 8 (1989), *aff'd sub nom* ***Clyde v. Human Rights Commission***, 206 Ill. App. 3d 283, 564 N.E.2d 265 (4th Dist. 1990).

It is clear that Respondent would have no trouble articulating a legitimate non-discriminatory reason for its actions. According to Respondent, Complainant did not request light duty and the note from her doctor did not require light duty.

On September 29, 1997, Complainant returned to work following a medical leave of absence. At that time, she gave Respondent a doctor's note which stated that she should not lift more than ten pounds. According to Beverly's affidavit, Respondent's room attendants are not required to lift anything that weighs more than ten pounds. As a result, there was no need to alter Complainant's duties.

In order to prevail at a public hearing in this matter,

Complainant would have needed to demonstrate that Respondent's articulated reason is pretextual. In order to prevail on the instant motion, she had to show that there is at least a genuine issue of material fact on the issue of pretext. She failed to meet that burden.

As noted above, Complainant already has admitted that she did not request light duty. In addition, she failed to file an affidavit challenging Beverly's assertion that room attendants did not need to lift more than ten pounds. Thus, Beverly's statement stands unrebutted and must be accepted as true. *See* ***Koukoulomatis v. Disco Wheels***, 127 Ill. App. 3d 95, 468 N.E.2d 477 (1st Dist. 1984). In short, according to the current record, Complainant neither requested nor needed light duty. Accordingly, it is impossible to see the failure to provide such duty as a sign of age animus.

Finally, there is the issue of Complainant's discharge. As noted above, the complaint alleges only that Complainant was denied light duty. She later was discharged by Respondent, but the discharge itself is not addressed in the complaint. Thus, although Complainant clearly sees the discharge as part of the mistreatment she claims she received, it is not directly a part of the case. It should be noted, though, that the decision to discharge Complainant was made by Tina Beverly, who was the person who had made the decision to hire Complainant. As Respondent points out, it is unlikely that the person who hired

Complainant at age 58 took action against her because of her age at 60.

In sum, then, there is nothing in the record that raises any genuine issue of material fact with regard to pretext. As a result, Respondent's motion should be granted.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that Respondent's Motion for Summary Decision be granted and that the complaint in this matter be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: February 9, 2001